TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~284.~~ 89

CHARLES W. HORNOR, PLAINTIFF IN ERROR,

vs.

GEORGE C. HENNING, Z. JONES, THOMAS J. GARDNER, GEORGE R. RUFF, THOMAS FRANCIS, WILLIAM BRYAN, JOHN A. RUFF, CHARLES A. ZIMMERMAN, AND JOHN C. McKELDEN.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 3, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 284.

CHARLES W. HORNOR, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Bond for writ of error	1	1
Writ of error	2	1
Declaration, notice, &c	3	2
Summons	12	5
Pleas to 1st count, demurrer to 2d and 3d	13	5
Replication and joinder in demurrer	16	6
Motion to send to general term	16	6
Order sending to general term	18	7
Orders in general term	19	7
Certificate	22	8

1 In the Supreme Court of the District of Columbia, the 28 day of September, 1874.

CHARLES W. HORNOR, PLAINTIFF,
vs.
GEORGE C. HENNING ET AL., DEFENDANTS. } At law. No. 11482.

Know all men by these presents that we, Charles W. Hornor, as principal, and Thomas J. Durant, as security, jointly & severally, are bound unto the above-named George C. Henning, Zephaniah Jones, & others, in the sum of five hundred dollars, to be paid to the said George C. Henning et al., their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 28th day of September, 1874.

Whereas the above-named Charles W. Hornor hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Charles W. Hornor shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES W. HORNOR. [SEAL.]
THOMAS J. DURANT. [SEAL.]

Sealed and delivered in presence of—
J. EMILIEU TRUDEAU.

Approved Sep. 29, 1874.

D. K. CARTTER,
Chief Justice.

(Endorsed:) Filed Sept. 29, 1874.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Charles W. Hornor, as plaintiff, and George C. Henning, Zephaniah Jones, Thomas J. Gardner, George R. Ruff, Thomas Francis, William Bryan, John A. Ruff, Charles A. Zimmerman, and John C. McKelden, are defendants, at law No. 11482, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceed-

ings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, this 29 day of September, in the year of our Lord 1874, and of the Independence of the United States the 99th.

[SEAL.]

R. J. MEIGS,
Clerk Sup. Ct., D. C.
By JOB BARNARD,
Asst. Clerk.

DISTRICT OF COLUMBIA, *to wit:*

To GEORGE C. HENNING, ZEPHANIAH JONES et al., defendants:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Charles W. Hornor is plaintiff and you are defendants, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chf. Just.

Service of above acknowledged this 29 day of September, 1874.
W. D. DAVIDGE,
Atty. for Defs

(Endorsed:) 11482. Charles W. Honor vs. George C. Henning et al. Writ of error. Filed Sep. 29, 1874. R. J. Meigs, clerk.

3 The answer of the chief justice and the justices of the supreme court of the District of Columbia to the foregoing writ of error is in the words following, to wit:

Declaration.

In the supreme court of the District of Columbia.

CHARLES W. HORNOR, PLAINTIFF, *vs.* GEORGE C. HENNING, ZEPHANIAH JONES, Thomas J. Gardner, George R. Ruff, Thomas Francis, William Bryan, John A. Ruff, Charles A. Zimmerman, and John C. McKelden, defendants.	No. 11482. At law.

Plaintiff sues the defendants—

4 First. For money payable by the defendants to the plaintiff for goods sold and delivered by the plaintiff to the defendants; and for work done and materials furnished by the plaintiff for the defendants at their request; and for money lent by the plaintiff to the de-

fendants; and for money paid by the plaintiff for the defendants at their request; and for money received by the defendants for the use of the plaintiff; and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Second. The plaintiff sues the defendants for that whereas, by the act of Congress approved June 17, 1870, (16 S. L., 153,) entitled "An act exempting from taxes certain property in the District of Columbia, and to amend the act to provide for the creation of corporations in the District of Columbia by general law," it is, among other things, provided that savings-banks may be organized within the District of Columbia under the provisions of section four of "An act to provide for the creation of corporations in the District of Columbia by general law," approved May 5, 1870, (16 S. L., 98,) by which said section four of the last-named act it is, among other things, provided, that "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company;" and thereupon, pursuant to said acts, and in accordance with the provisions thereof, there was, on or about the 5th day of February, A. D. 1873, duly organized within the District of Columbia a savings-bank, known and styled as the Washinton City Savings-Bank, with a capital of fifty thousand dollars, as expressed in the certificate of incorporation filed in the office of recorder of deeds for the District of Columbia, and recorded in liber "Deeds of Corporations," on page 270, et sequentes, which said Washington City Savings-Bank was, on the twenty-sixth day of September, 1873, indebted to the plaintiff in the sum of four thousand dollars, which said debt the said savings-bank has refused and still refuses to pay, though thereunto amicably requested; and the indebtedness of the said Washington City Savings-Bank being then and there over nine hundred thousand dollars in excess, that is to say, of the said capital stock of fifty thousand dollars so fixed and ascertained by the certificate of incorporation aforesaid, in the sum of eight hundred and fifty thousand dollars; and the said defendants being the trustees named by the said certificate of incorporation, to serve as such for the term of one year from the fifth day of February, 1873, and assenting to the said excess of said indebtedness over the capital stock, they, and each of them, became and were then and there personally and individually liable to the creditors of the said Washington City Savings-Bank, and thereby and by force of said statute an action has accrued to the said plaintiff to demand and have of and from the said defendants the said sum of four thousand dollars so due to him by the said savings-bank, and by said savings-bank so refused to be paid as aforesaid.

Third. For that the defendants were and are trustees of the Washington City Saving-Bank, a company duly organized in the District of Columbia, under the acts of Congress approved May 5, 1870, and June 17, 1870, entitled respectively, "An act to provide for the creation of corporations in the District of Columbia, by general law;" (16 S. L., 98,) and "An act exempting from taxes certain property in the District of Columbia, and to amend the act to provide for the creation of corporations in the District of Columbia, by general law;" (16 S. L., 153,) and as such trustees assented to an increase of the indebtedness of said savings-bank to the sum of eight hundred & fifty thousand dollars in excess of the capital stock of said savings-bank; which said excess of indebtedness of eight hundred and fifty thousand dollars, or thereabouts, is still due and unpaid by said savings-bank to its creditors

among whom is the plaintiff; and thereby by force of the said statutes the said defendants became and are personally and individually liable unto him in the sum of four thousand dollars, being the amount due him by said Washington City Savings-Bank.

And the plaintiff demands of the said defendants the sum of
9 thirty-six hundred and three dollars and sixty cents, with interest from September 26, 1873, and costs according to the annexed particulars of demand.

R. D. MUSSEY,
Attorney for Plff.

The defendants are to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise, judgment.

R. D. MUSSEY,
Attorney for Plff.

I, Charles W. Hornor, plaintiff, being duly affirmed, say:

1st. I make this affidavit under the 75th rule of the court, to be filed with the declaration in a suit which I have directed R. D. Mussey, esq., attorney, to bring against George C. Henning et al., the nine defendants set forth herein.

2d. I claim from the defendants the sum of thirty-six hundred
10 and three $\frac{61}{100}$ dollars, with interest from September 26th, 1873, which is the amount due me for the balance of my deposit-account with the Washington City Savings-Bank, due to me on that day.

3d. This sum claimed is exclusive of all set-offs and just grounds of defense.

CHARLES W. HORNOR.

Affirmed and subscribed before me at Washington, this 24th October, 1873.

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Asst. Clerk.

Particulars of demand.

Washington City Savings-Bank to Charles W. Hornor, Dr.

DEBITS.

1873. April	8.	Cash	$121 25	
	15.		1,480 00	
June	9.		3,287 65	
	18.		64 00	
July	12.		109 59	
Aug.	5.		363 65	
	27.		5,000 00	
11 Sept.	5.		186 07	
	15.		100 00	
	26.	Interest	52 50	
				$10,764 71

CREDITS.

1873. May	1.	By cash	$50 00
June	6.		571 04
	9.		100 00
	14.		2,125 00
	19.		150 00
	23.		204 00
	24.		23 65
	27.		98 08
	28.		73 40
July	14.		300 00
	17.		84 75
	"		47 50
	25.		367 19
	"		49 00
Sept.	1.		300 00
	3.		2,500 00
	5.		100 00
	15.		1,750 00
		Balance	3,603 60
			$10,764 71

12 (Indorsed:) Filed Oct. 24, 1873. R. J. Meigs, clerk.

Summons.

In the supreme court of the District of Columbia, the 24 day of Oct., 1873.

CHARLES W. HORNOR, PLAINTIFF,
vs.
GEORGE C. HENNING, ZEPHANIAH JONES, THOMAS J. GARDNER, GEORGE R. RUFF, THOMAS FRANCIS, WILLIAM BRYAN, JOHN A. RUFF, CHARLES A. ZIMMERMAN, and JOHN C. McKELDEN, defendants. } At law. No. 11482.

The President of the United States to the defendants, greeting:

You are hereby commanded to appear in this court, on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness:

D. K. CARTTER,
Chief Justice.

13 R. J MEIGS, *Clerk*,
By JOB BARNARD,
Asst. Clerk.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

R. D. MUSSEY.

(Endorsed:)
Issued Oct. 24, 1873.
Served copies of the declaration, affidavit, notice to plead, and this summons on all the defendants the 28 day of Octo., 1873.
A. SHARP, *Marshal.*

Pleas to 1st count & demurrer to 2d & 3d.

In the supreme court of the District of Columbia.

CHARLES W. HORNOR
vs.
GEORGE C. HENNING AND OTHERS. } At law. No. 11482.

The defendants say as to the supposed causes of action in the first count:

14 1. That they did not promise as alleged.

2. That they never were indebted as alleged.

And as to the second and third counts the defendants say that the same are bad in substance and demur thereto.

NOTE.—Among the grounds of demurrer are, whether the 4th section of the act of May 5, 1870, is applicable to the indebtedness of a savings-bank to its depositors; and, if so, whether the liability of trustees is to all the creditors or to each, and whether the liability is sufficiently alleged in the 2d & 3d counts, which do not allege that the debt claimed by the plaintiff was contracted in excess of the amount of capital stock, and are otherwise vague, uncertain, and insufficient.

W. D. DAVIDGE,
Atty. for Defts.

DISTRICT OF COLUMBIA, *ss:*

15 Personally appeared before me, the clerk of the sup. c't of the District of Columbia, Thomas Francis, one of the defendants in the above-entitled cause, and made oath, in due form of law, that he denies all indebtedness on the part of himself and his codefendants to the plaintiff, and says that the only indebtedness ever claimed or pretended by the plaintiff to exist is in consequence of alleged official relation of the defendants to the Washington City Savings-Bank as trustees, which alleged indebtedness is the subject of the 2d and 3d counts of the declaration, and as to which the defendants are advised by counsel that they have a valid defense in law.

As respects the 1st count of the declaration, this affiant says that the facts therein stated are not true, nor is it true that the defendants personally ever had any transaction with the plaintiff.

THOS. FRANCIS.

Subscribed and sworn to before me this 3rd day of December, 1873.
R. J. MEIGS, *Clerk*,
By JOB BARNARD, *Asst. Clerk.*

(Endorsed:) Filed Dec. 3, 1873.

16 *Replication and joinder in demurrer.*

In the supreme court of the District of Columbia, the 5th day of December, 1873.

CHAS. W. HORNOR
vs.
GEO. C. HENNING ET AL. } At law. 11482.

Replication and joinder in demurrer.

The plaintiff takes issue upon the defendants' pleas, and says that the declaration is good in substance.

R. D. MUSSEY,
For Plff.

(Endorsed:) Filed Dec. 5, 1873. R. J. Meigs, clerk.

Motion to order to general term.

In the supreme court of the District of Columbia.

C. W. HORNOR
vs.
GEO. C. HENNING ET AL. } At law. No. 11482.

17 Now come the plaintiff and defendants, and move the court to order the argument of the demurrer in this case to be heard in the general term in the first instance.

R. D. MUSSEY,
For Plff.
W. D. DAVIDGE,
For Defts.

(Endorsed:) Filed Dec. 5, 1873. R. J. Meigs, clerk.

18 FRIDAY, *December* 5, 1873.

Session resumed, pursuant to adjournment, MacArthur, justice, presiding.

CHARLES W. HORNOR, PLFF.,
vs.
GEORGE C. HENNING ET AL., DEFTS. } At law. No. 11482.

At the request of the plaintiff and the defendants, it is ordered that the demurrer in this case be heard in the general term in the first instance.

19 FRIDAY, *January* 30, 1874.

Session resumed pursuant to adjournment.

Present, Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

CHARLES W. HORNOR, PLFF.,
vs.
GEORGE C. HENNING, ZEPHANIAH JONES, Thomas J. Gardner, George R. Ruff, Thomas Francis, William Bryan, John A. Ruff, Charles A. Zimmerman, and John C. McKelden, defendants. } At law. No. 11482.

Argued by Mr. Davidge, for the defendants, and Mr. Mussey, for the plaintiff, and submitted to the court upon the demurrer to the 2d and 3d counts.

SATURDAY, *June* 20, 1874.

Session resumed pursuant to adjournment.

Present, Justices Olin, Wylie, Humphreys, and MacArthur; absent, Chief-Justice Cartter.

20 CHARLES W. HORNOR, PLAINTIFF,
vs.
GEORGE C. HENNING, ZEPHANIAH JONES, Thomas J. Gardner, George R. Ruff, Thomas Francis, William Bryan, John A. Ruff, Charles A. Zimmerman, and John C. McKelden, defts. } At law. No. 11482.

And now again come here, as well the plaintiff as the defendants, by

their respective attorneys; whereupon it is considered by the court here that the second and third counts of the declaration are bad in substance, and therefore that the defendants' demurrer thereto be, and the same is hereby, sustained; that the plaintiff take nothing by said counts, and that the defendant go thereof without day.

21 Proceedings before the supreme court of the District of Columbia in general term, commencing on the fourth Monday, 28th day of September, 1874; present, Chief Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

CHARLES W. HORNOR, PLAINTIFF,
vs.
GEORGE C. HENNING, ZEPHANIAH JONES, Thomas J. Gardner, George R. Ruff, Thomas Francis, William Bryan, John A. Ruff, Charles A. Zimmerman, and John C. McKelden, defendants. } At law. No. 11482.

And now comes the plaintiff, by his attorney, Mr. Mussey, and says that he will not further prosecute his suit against the defendants for or in respect of the causes of action in the first count of the declaration mentioned; therefore it is considered that the plaintiff take nothing by his suit, and that the defendants go thereof without day, and recover against the plaintiff the costs of their defense, to be taxed by the clerk, and have execution thereof.

22 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the district of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 2d day of October, 1874.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Assistant Clerk.

Cost of transcript, $7.00.

(Indorsement on cover:) No. 284. Charles W. Hornor, plaintiff in error, vs. George C. Henning, Z. Jones, Thomas J. Gardner, George R. Ruff, Thomas Francis, William Bryan, John A. Ruff, Charles A. Zimmerman, & John C. McKelden. Dist. of Columbia sup. court. Filed 3rd October, 1874.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 87.

CHARLES W. HORNOR, PLAINTIFF IN ERROR.

vs.

GEORGE C. HENNING ET. AL.

In Error to the Supreme Court of the Dist. of Columbia.

BRIEF FOR PLAINTIFF.

F. P. CUPPY,

Counsel for Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1876.

In the Supreme Court of the United States.

October Term, 1876.

CHARLES W. HORNOR
vs.
GEORGE C. HENNING AND EIGHT OTHERS.

No. 87.

In Error to the Supreme Court of the District of Columbia.

STATEMENT OF THE CASE.

The defendants were trustees of the Washington City Savings Bank, which was organized February 5th, 1870, under the act of Congress, entitled, "*An act to provide* "*for the creation of corporations in the District of Colum-* "*bia by general law*," approved May 5th, 1870; and the act "amendatory thereof, entitled, "*An act exempting from* "*taxes certain property in the District of Columbia, and* "*to amend the act to provide for the creation of corpora-* "*tions in the District of Columbia by general law*," approved June 17th, 1870.

Stat. at Lg., vol. 16, pp. 96 *et sequentes* and 153.

The act of May 5th, 1870, as amended by the act of June 17th, 1870, provides that "If the indebtedness of any com- "pany organized under this act shall at any time exceed the "amount of its capital stock, the trustees of such company

"assenting thereto shall be personally and individually "liable for such excess to the creditors of the company."

Stat. at Lg., p. 105.

On the 26th day of September, 1873, the indebtedness of the Washington City Savings Bank did exceed its capital stock in the sum of $850,000, and at the same date said Savings Bank was indebted to the plaintiff in the sum of $4,000, the payment of which was duly demanded by the plaintiff and refused by said Savings Bank, and which sum of $4,000, with interest, is still due and unpaid.

That the defendants, as trustees of said Savings Bank, assented to said indebtedness of said Savings Bank in the sum of $850,000 in excess of its capital stock, and plaintiff therefore claims that the defendants thereby became liable to him "personally and individually" for the amount due him as a creditor of said Savings Bank.

He therefore brings his suit against the defendants in their personal capacity, and files his declaration on the 24th day of October, 1873, and the defendants were all duly served with summons copies of the declaration, &c., on the 28th day of October, 1873. In his declaration the plaintiff first sets forth the liability of the defendants under the common counts, and adds two other counts, in each of which he avers specifically the facts hereinbefore stated, and cites the parts of the statute on which he relies.

Vide Rec., pp. 2, 3, and 4.

To the first count the defendants plead the general issue.

To the second and third counts they demur generally, and say that said counts are bad in substance.

To this demurrer the plaintiff filed his joinder, and thereby raised the issue of law as to the sufficiency of the substance of the first and second counts.

The court below sustained the demurrer, and rendered a judgment against the plaintiff for costs.

The case is now before this court in error to the Supreme Court of the District of Columbia, and plaintiff claims that in the record of the court below there is error in the following particulars, viz:

ASSIGNMENT OF ERRORS.

First. That the court below erred in sustaining the demurrer to the first and second counts of the declaration.

Second. And in not rendering a judgment for the plaintiff for the amount claimed in his declaration, with interest and costs.

Third. And in rendering a judgment against the plaintiff for costs.

ARGUMENT.

This is a statutory action in *debt* to recover a penalty founded on a *tort*, and presents to this Court upon the record as it now stands two questions, viz:

First. Does the statute provide the remedy which the plaintiff seeks to enforce against the defendants?

Second. If it does provide such a remedy, has the plaintiff by the averments of the second and third counts in his declaration substantially stated the facts which bring his case within the provisions of the statute, when these averments are tested by the rules of pleading applicable to an issue of law raised by a joinder in a *general demurrer?*

The first of these questions seems to us to be settled in the affirmative by the plain and unmistakable language of the act of Congress of May 5, 1870:

"If the indebtedness of any company organized under this "act shall at any time exceed the amount of its capital

" stock, the trustees of such company assenting thereto shall " be personally and individually liable for such excess to the " creditors of the company."

16 Stat. at Lg., p. 105, last paragraph.

Under these provisions of the statute, what concurrence of acts and events is required to enable the plaintiff to recover of the defendants the debt due him from the Washington City Savings Bank ?

1st. That the Washington City Savings Bank was organized under section 4 of the act of May 5, 1870.

2d. That the defendants were trustees of said Savings Bank.

3d. That the indebtedness of said Savings Bank exceeded its capital stock, and that the defendants as such trustees assented to such excess of indebtedness.

4th. That the plaintiff was a creditor of said Savings Bank.

Do the 2d and 3d counts of the declaration substantially aver the several foregoing facts ?

The second count :

1st. Refers to the acts of May 5th and June 17th, 1870, and avers that, " pursuant to said acts and in accordance " with the provisions thereof, there was, on or about the 5th " day of February, A. D. 1873, duly organized within the " District of Columbia a savings bank known and styled as " the Washington City Savings Bank, with a capital of fifty " thousand dollars."

2d. That " said Washington City Savings Bank was, on " the twenty-sixth day of September, 1873, indebted to the " plaintiff in the sum of four thousand dollars, which said

" debt the said savings bank has refused and still refuses to " pay, though thereunto amicably requested."

3d. " And the indebtedness of said Washington City " Savings Bank being then (viz., on the 26th day of September, " 1873) and there over nine hundred thousand dollars in ex- " cess, that is to say, of the said capital stock of fifty thou- " sand dollars."

4th. "And the said defendants, being the trustees named " by the said certificate of incorporation, to serve as such " for the term of one year from the 5th day of February, " 1873, and assenting to the said excess of said indebtedness " over the capital stock, they, and each of them, became and " were then (September 26, 1873) and there personally and " individually liable," &c.

We can scarcely conceive what other terms could be employed to make clearer or more exact the facts and conditions which fix upon the trustees the personal and individual liability for which the statute provides.

Under a rule of court governing in the court below, the party demurring to any pleading is required to append to his demurrer a marginal note, in which he is required to set forth the grounds upon which his demurrer is based, or the legal propositions upon which he relies in support of his demurrer. In pursuance of this rule the counsel for the defendants in this case appended the following marginal note: " NOTE.— " Among the grounds of demurrer are, whether the 4th sec- " tion of the act of May 5, 1870, is applicable to the indebt- " edness of a savings bank to its depositors; and if so, " whether the liability of trustees is to all the creditors or to " each, and whether the liability is sufficiently alleged in the " 2d and 3d counts, which do not allege that the debt claimed " by the plaintiff was contracted in excess of the amount " of capital stock, and are otherwise vague, uncertain, and " insufficient."

Not having been counsel in the case in the court below we have not the advantage of having heard the oral argument made by counsel for the defendants in that court, and should hence be left to doubtful surmise as to what legal propositions the defendants relied upon in support of their demurrer were it not for the information furnished by the marginal note before quoted.

a. The first proposition suggests the question, "Whether "the 4th section of the act of May 5, 1870, is applicable "to the indebtedness of a savings bank to its depositors?" As the term "creditors," as employed in the statute, is used without qualification or limitation, we are at loss to know by what rule of construction any particular class of creditors are excluded; and we are still less unable to understand why Congress should have excluded depositors, who, from the nature of the business transacted by savings banks, are most likely to represent almost the entire indebtedness of the bank, and whose claims in many instances have the special merit of a debt for money deposited in trust merely for safe keeping, and without interest.

b. The second ground of demurrer raises the question "whether the liability of trustees is to all the creditors or to "each?" "The creditors of the company" is the language employed in the 4th section of the act of May 5th, 1870, to designate and describe the persons who, upon the happening of certain contingencies, may have their right of action against the trustees, "personally and individually." Between these creditors, *as creditors*, there is no privity of contract, and no joint or common interest, which requires, or even allows a joint action at law or proceeding in equity, to recover from the trustees a statutory penalty, equal in amount to the debt severally due each individual creditor. The right of action, whenever it accrues, is a separate, sole, individual right, which inures severally to each and every creditor; and in like

manner the liability of the trustees is a liability to each and every creditor severally.

These conclusions seem to us to result necessarily from the language used in the statute. It was the evident intention of Congress to hold the trustees to the strictest accountability, and whenever they encroached upon the safeguards which the statute provided, to protect the rights and interests of honest and innocent creditors, it was in like manner the purpose of the Legislature that enacted the statute to give to each and every creditor a speedy and independent remedy, whereby he might compel justice, and secure himself against loss and disaster, resulting from the adventures, mismanagement, or frauds of the officers of the Savings Bank.

The business of banking, and the problems connected with, and growing out of that business, have engaged the attention of our State and Federal Legislatures for many years, and numerous experiments, attended with most unsatisfactory results, have admonished legislators, to provide the most stringent safeguards to protect depositors and bill-holders from the losses and disasters which they have so often suffered through the fraud and mismanagement of these incorporated companies.

In the act of May 5th, 1870, the determination of Congress to provide the fullest protection to persons dealing with all companies organized under that act is too manifest to admit of question.

To secure this protection to the depositors and other creditors of savings banks organized under the provisions of this general law, the statute, among other things, provides:

1. That the persons desiring to incorporate a savings bank or other company under the provisions of this act must first file in the office of the register of deeds for the District of Columbia a certificate, duly signed and acknowledged, and open at all times to public inspection, which certificate shall set forth the corporate name of said company, the object for

which it is formed, the amount of its capital stock, the number of shares of stock, and the number and names of the trustees, who shall manage the concerns of said company for the first year.

By and through the public record of this certificate, all persons proposing to deal with any savings bank organized under this act may ascertain—

a. The amount of its capital stock and the number of shares into which it is divided; the scope and object of the business which it proposes to transact; and from these each one may determine for himself whether or not the business of the bank is likely to be safe and useful, or otherwise.

b. "The number of trustees and their names, who shall "manage the concerns of said company for the first year;" and from this information every one may determine for himself whether or not the trustees are men of such pecuniary responsibility, business experience, and probity of character as to insure a safe, honest, and useful administration of the business of the bank during the first year of its corporate existence.

In addition to these provisions there are others which even more decidedly illustrate the will and determination of Congress to impose upon trustees the strictest accountability, enforced by personal liabilities and penalties, and thereby affording ample securities and enlarged remedies to creditors.

Experience had demonstrated the danger of allowing such corporations to contract debts in amount greater than their capital stock; and Congress in this act evidently intended to limit the indebtedness of every company organized under the provisions of section 4, to a sum which should not exceed its capital stock paid in, or secured to be paid in, in money only; the effect of which would be that creditors for every dollar due them, would have a corresponding dollar of capital

stock paid in and held by the company as a security for the payment of their debts.

To this end the act provides that "before any corporation "shall be entitled to diminish the amount of its capital, if "the amount of its debts and liabilities shall exceed the "amount of capital to which it is proposed to be reduced, "such amount of debts and liabilities shall be satisfied and "reduced so as not to exceed such diminished amount of "capital."

16 Stat. at Lg., p. 105.

In harmony with this provision, and in further illustration of the wise determination of Congress to limit the indebtedness of all these corporations to an amount equal to their capital paid in or secured to be paid in in money only, is that other provision upon which the plaintiff in this case bases his right of action. "If the indebtedness of any company "organized under this act shall at any time exceed the "amount of its capital stock, the trustees of such company "assenting thereto, shall be personally, and individually "liable for such excess to the creditors of the company."

16 Stat. at Lg., p. 105.

This provision was undoubtedly designed to restrain the wild spirit of adventure and hazardous speculation, which had so often reduced like corporations to bankruptcy, and brought disaster and ruin upon honest and confiding creditors. It provides a penalty against the trustees who assent to an indebtedness beyond the amount of capital stock, while it at the same time provides a security and a remedy for the creditors. This construction is in harmony with the other provisions of the statute, and gives to the law the effect which Congress evidently intended; while the construction suggested by the defendants' counsel, defeats the manifest

intention and will of the Legislature, and renders the statute inoperative, and, in effect, null and void.

By reference to the 4th section of the act of May 5th, 1870, it is apparent that personal and individual liability to creditors is the almost uniform penalty prescribed by the statute for trustees and officers who fail to comply with the provisions of the statute. The 4th section requires every such company to make and publish an annual report showing the amount of its capital stock, paid and unpaid, and the amount of indebtedness; and provides that if any company shall fail to make such report, "all the trustees of the com- "pany shall be jointly and severally liable for the debts of "the company then existing, and for all that shall be con- "tracted before such report shall be made."

In the same section it is also provided that nothing but money shall be received in payment of capital stock, and no loan of money shall be made to any stockholder: "and if "any such loan shall be made to a stockholder, the officers "who shall make it, or who shall assent thereto, shall be "jointly and severally liable to the extent of such loan and "interest, for all the debts of the company contracted while "they are stockholders or officers thereof."

Again, in the same section, it is provided that—

"If any certificate or report made, or public notice given "by the officers of any company in pursuance of the pro- "visions of this act shall be false in any material representa- "tion, all the officers who shall have signed the same, know- "ing it to be false, shall be jointly and severally liable for "all the debts of the company contracted while they are "stockholders or officers thereof."

These provisions, and others of a like import, illustrate the intention and purpose of Congress to provide a security and a remedy for creditors in certain cases, by fastening upon trustees and officers, a liability in the nature of a penalty.

This is the manifest policy by which Congress was guided and governed in the enactment of this statute; and upon

what rule or principle of construction it can be maintained that the paragraph upon which the plaintiff founds his action in this case is exceptional, we are not able to comprehend, and until we shall have learned what counsel for the defendants in error may be pleased to offer in support of the demurrer, we do not feel at liberty longer to engage the attention or occupy the time of this tribunal.

F. P. CUPPY,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1876.

CHARLES W. HORNOR

vs.

GEORGE C. HENNING ET AL.

No. 87.

Supplement to Brief for Plaintiff in Error.

STATUTES REFERRED TO.

Extracts from the act entitled "An act to provide for the "creation of corporations in the District of Columbia by "general law," approved May 5, 1870.

Provision is made that every company organized under the provisions of this act shall make and publish annually a report, stating the amount of capital paid in and unpaid, and the amount of existing debts, and it is provided in express terms that—

1st. "If any of the said companies shall fail so to do, all "the trustees of the company shall be jointly and severally "liable for the debts of the company then existing, and "for all that shall be contracted before such report shall "be made."

16 Stat. at Lg., p. 104.

2d. "If the trustees of any such company shall declare "and pay any dividend the payment of which would ren- "der it insolvent, or which would diminish the amount of "its capital stock, they shall be jointly and severally liable "for all the debts of the company then existing, and for "all that shall be thereafter contracted, while they shall "respectively remain in office."

Ubi supra.

3d. "Nothing but money shall be considered as pay- "ment of any part of the capital stock, and no loan of "money shall be made by any such company to any stock- "holder therein; and if any such loan shall be made to a "stockholder the officers who shall make it or who shall "assent thereto shall be jointly and severally liable to the "extent of such loan, and interest, for all the debts of "the company contracted while they are stockholders or "officers thereof."

Ubi supra.

4th. "If any certificate or report made, or public notice "given, by the officers of any company in pursuance of the "provisions of this act, should be false in any material "representation, all the officers who shall have signed the "the same, knowing it to be false, shall be jointly and "severally liable for all the debts of the company con- "tracted while they are stockholders or officers thereof."

Ubi supra.

5th. "The stockholders of any company organized under "the provisions of this act shall, jointly, severally, and in- "dividually, be liable for all debts that may be due and "owing to all their laborers, servants, and apprentices, for

" services performed for such corporation, and shall be in-
" dividually liable for all debts of said corporation to the
" amount of the stock of each stockholder."

16 Stat. at Lg., pp. 104, 105.

6th. " But before any corporation shall be entitled to
" diminish the amount of its capital stock, if the amount
" of its debts and liabilities shall exceed the amount of
" capital to which it is proposed to be reduced, such amount
" of debts and liabilities shall be satisfied and reduced so
" as not to exceed such diminished amount of capital."

Ubi supra.

7th. " *If the indebtedness of any company organized*
" *under this act shall at any time exceed the amount of its*
" *capital stock, the trustees of such company assenting*
" *thereto shall be personally and individually liable for*
" *such excess to the creditors of the company.*"

Ubi supra.

8th. " *An act exempting from taxes certain property in*
" *the District of Columbia, and to amend the 'Act to*
" *' provide for the creation of corporations in the District*
" *' of Columbia by general law.'* "

" SEC. 2. *And be it further enacted,* That savings banks
" may be organized within the District of Columbia under
" the provisions of section four of an act 'to provide for
" ' the creation of corporations in the District of Columbia
" ' by general law.' " Approved June 17, 1870.

16 Stat. at Lg., p. 153.

The plaintiff in error claims—

1st. That as section 4 of the act of Congress of May 5, 1870, provided for the organization of companies for "carrying on any kind of manufacturing, agricultural, mining, mechanical business, insurance, mercantile, transportation, or marketing, in the District of Columbia," and the act of June 17, 1870, merely authorizes Savings Banks to organize and do business *under the provisions of section 4 of the act of May* 5, 1870, therefore, in construing the act as applied to trustees of Savings Banks, the rules of construction applicable to the liability of trustees of mercantile, mining, and other companies under the first act, should be applied.

2d. That the right of action is separate and several in favor of each and every creditor.

3d. That the liability is a joint liability, to which all the trustees assenting to an excess of indebtedness over the amount of the capital stock may be subjected.

4th. That the statute does not designate or prescribe, expressly or by implication, the form of the remedy which the creditor shall resort to, and that he therefore has the right to elect any form of remedy which may be appropriate, under the circumstances of his particular case.

5th. That in the case at bar, an action at law lies in favor of the plaintiff against the defendants, for the amount of his debt and interest, and that a declaration in debt is the proper form of action. In support of the last proposition the plaintiff refers to the following authorities.

3 Paige, 409, and 415–16.

Bank of Poughkeepsie *vs.* Ibbotson, 24 Wend., 473, 474, and 479.

Garrison *vs.* Howe, 17 New York Rep., 458, 462, 463, and 464.

Simmons *vs.* Spencer, 15 N. Y. Rep., 548.

Chandler *vs.* Hoag, 5 N. Y. Sup. Court Rep.

Union Iron Co. *vs.* Pierce *et al.*, 4 Bissell, 327.

Dozier *vs.* Thornton, 19 Georgia, 325.

Bullard *vs.* Bell, 1 Mason, 243.

Culver *vs.* National Bank of Chicago, 64 Illinois, 530.

Steele *vs.* Dunne, 65 Illinois, 298.

F. P. CUPPY,
Counsel for Plaintiff in Error.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1876.

CHARLES W. HORNOR,
Plaintiff in Error,
vs.
GEORGE C. HENNING et al.

No. 87.

BRIEF OF DEFENDANTS IN ERROR.

WALTER D. DAVIDGE,
For Defendants in Error.

National Republican Printing House.

U. S. Supreme Court.

OCTOBER TERM, 1876.

CHARLES W. HORNOR, Plaintiff in Error,
vs.
GEORGE C. HENNING et al.
No. 87.

The plaintiff below sued the defendants, trustees of the Washington City Savings Bank, to recover a balance alleged to be due the plaintiff as a depositor of the bank. The declaration contained three counts, the first averring a common law liability, (R., pp. 2, 3,) and the second and third a special liability alleged to exist by statute. To the first count the defendants pleaded the general issue, (R., p. 6,) and to the second and third counts demurred. The plaintiff joined issue on the plea and demurrer. The demurrer was certified to the court in general term to be heard in the first instance, (R., p. 7,) and on hearing was sustained, and judgment rendered for the defendants on the second and third counts. (R., pp. 7, 8.) Subsequently the plaintiff entered a *nol. pros.* as to the first count, and the court thereupon entered final judgment in favor of the defendants. The plaintiff then sued out this writ of error.

The only point presented for revision is whether under the second and third counts the defendants were liable.

The provision of the statute upon which the second and third counts are founded is as follows:

"If the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable *for such excess to the creditors of the company.*"

16 Statutes at Large, p. 105.

Both counts averred indebtedness exceeding the capital stock of $50,000, to the amount of $850,000, and due to creditors, of whom the plaintiff was one.

Points.

I. Under the above provision of the statute the liability of trustees is for the excess of indebtedness, and to the creditors of the company. One creditor, where there are others, cannot maintain an action for his individual debt.

The liability claimed is purely the creature of the statute. It did not exist at common law. It is besides penal in its nature. Hence the statute should be strictly construed. The terms of the statute are plain beyond the reach even of cavil. They create one liability, that is, for the excess, and designate who shall be entitled to it; that is, the creditors of the company. They do not make the trustees liable on the contracts of indebtedness which created the excess, but solely for the excess itself. The liability of the trustees for the amount of this excess is not to the persons who hold the contracts of indebtedness in excess, but to creditors generally, and for the reason that the indebtedness in excess has diminished the corporate fund, that is, the capital stock, which was responsible to the creditors existing before the excess. Hence, when the trustees are required to replace the excess it is for the

benefit of all the creditors, irrespective of whether their debts formed part of the excess or not.

The whole scheme of the provision is the creation of a fund for the benefit of all the creditors of the company.

Sturgis *vs.* Burton, 8 Ohio State, 215, involved the identical point here presented. The statute gave an action to any creditor against the directors of a bank for the excess of indebtedness happening during their administration beyond twice the amount of capital stock, less sums due for deposits. A creditor, there being others, sued for his individual debt, which he claimed was contracted in excess. *Held* that the action would not lie; that the thing to be recovered was the excess, and that the recovery was to be for the benefit of all creditors, whether their debts were within or in excess of capital stock. So too in Massachusetts. By a statute of that State, whenever an excess of indebtedness beyond the capital stock of a manufacturing company shall exist, "the directors under whose administration it shall happen shall be jointly and severally liable to the *extent of such excess* for all the debts of the company then existing, and for all that shall be contracted so long as they respectively continue in office, and until the debt shall be reduced to the said amount of the capital stock."

In the Merchants' Bank *vs.* Stevenson, 10 Gray, 232, the plaintiff brought suit for his individual debt. Shaw, C. J., says, p. 235: "The directors are liable for the *whole amount* for which they are liable." "There are various parties having several and unequal claims against a *common fund;* that fund here consists by statute of the excess of the debt over the capital; and the claims of the creditors by the case stated greatly exceed that fund." And the ruling of the court was that the liability being for a common fund for the benefit of all creditors, the only remedy was in equity where all the creditors could be convened and the proper accounts taken.

The question again came before the Supreme Court of Massachusetts in Stevenson *vs.* The Merchants' Bank, 5 Allen,

398. This was a bill in equity, the complainant being probably the plaintiff who had failed in his suit at law by the decision in 10 Gray. The equity jurisdiction was denied, but ably and elaborately vindicated upon the ground that the liability was for a common fund for the benefit of all the creditors, and that only in equity could the excess which constituted that fund be ascertained by taking an account of debts, and having the share due to each creditor apportioned among them.

To the same effect is Moore *vs.* Reynolds, 109 Mass., 473.

See also Harris *vs.* The First Parish of Dorchester, 23 Pick., 112. Note.

Crease *vs.* Babcock, 10 ~~Mch.~~, 531.

Morse on Banking, pp. 438 and 439, and cases cited.

As regards the Massachusetts statute, there was certainly some room for controversy. It declared the liability to be "to the extent of ~~the liability~~ such excess for all the debts of the company," &c., and the remedy was claimed to belong to "any creditor."

The conclusion that the liability was substantially for the excess and not for the different debts making it up, had therefore to be reached argumentatively. All verbal refinements were made to yield to the manifest spirit and purpose of the law and the gross injustice of subjecting defendants to many suits when full reparation could be made in one, and of allowing plaintiffs to appropriate more than their share of what was meant to be a common fund.

In the present case, however, the statute of this District has, it is submitted, declared what and to whom the liability shall be in terms too plain to admit of serious question.

As a corollary from the above, it follows that the plaintiff mistook not only his right but his remedy. The statute is silent as to remedy. It says nothing as to the *forum*, but gives the right to creditors. These cannot be convened and the accounts taken in a court of law, and hence the only

remedy is in equity; and such remedy follows as directly from the character of the liability as from express provision.

Pollard *vs.* Bailey, 20 Wall., 520.

II. Assuming even that the statute could be construed as imposing a statutory contract upon the trustees in respect of all creditors whose debts were contracted in excess of the amount of capital stock, the declaration is fatally defective.

1. Because neither the 2d nor 3d count alleges that the debt sued for was so contracted.

2. The trustees would be bound "personally and individually," (personally as distinguished from officially, and individually from jointly,) and could not be joined in the same action.

III. The allegations of the 2d and 3d counts do not show that the plaintiff, a depositor of the savings-bank, was a creditor within the meaning of the statute.

The only authority given by the act of July 17, 1870, (16 Stats. at L., 153,) was to establish *savings-banks* under the provisions of section 4 of the general law. In such banks deposits do not ordinarily create the relation of debtor and creditor except in a qualified sense. The deposits are to be invested and managed for the benefit of the depositors, who are entitled to their share of the profits or dividends and are practically parties in interest. The relation is fiduciary and rather that of principal and agent, or partners, than debtor and creditor. Webster defines a savings-bank to be "a bank in which the savings of the poor are deposited and put to interest *for their benefit.*"

The peculiar character of such banks has been recognized in the internal revenue legislation of Congress, and on several occasions received the attention of this court.

Bank for Savings *vs.* The Collector, 3 Wall., 495.

Cary *vs.* Savings-Bank, 22 Wall., 38.

When such banks were allowed to be organized, it is to be presumed Congress used the term in its ordinary and

popular sense, in which, it is submitted, an essential element is that the deposit does not become the property of the depositee, but is to be invested and managed for the depositor.

It seems absurd to suppose that Congress intended that every dollar deposited should be secured by a dollar of capital stock under pain of personal liability on the part of the trustees, or that the capital stock was, in order to present such liability, to be increased from time to time with the shifting increase of deposits under the provisions of the general law, p. 105; and it seems equally absurd that trustees should be held liable for doing the very thing which the depositor consented and directed they should do for his benefit.

It is submitted, therefore, that the depositor in a savings-bank is not, *prima facie*, a creditor within the meaning of the individual liability provision, but is as much a part of the company as stockholders or officers. The meaning of the law was to protect those outside the company and not those inside. No officer or stockholder, or other constituent member of the company, can claim the benefit of the clause. In Kritzer *vs.* Woodson, 19 Missouri, 327, the statute was substantially as here, p. 329. A stockholder having been compelled to pay a debt due by the company sued the directors and claimed to recover it back from the trustees on the ground of excess over capital. The court held, on demurrer, that the statute was not intended to afford protection to those belonging to the company.

Turning now to the two counts. They merely allege the organization of a savings-bank with a capital of $50,000 ~~of the character of such organization~~, but are wholly silent as to the relation in which, under it, or the by-laws of the bank, the depositors stood to the latter.

W. D. DAVIDGE,
Attorney for Defendants in Error.

124-235